No. 200,748-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN THE MATTER OF THE
DISCIPLINARY PROCEEDINGS AGAINST

J. DAVID SMITH

An Attorney at Law

Bar Number 8993

REPLY BRIEF OF RESPONDENT SMITH

Attorney for Respondent Smith

Kurt M. Bulmer, WSBA # 5559
Attorney at Law
740 Belmont Pl. E., # 3
Seattle, WA 98102

(206) 325-9949

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ELC 10.14(c) 1 (and multiple places thereafter)

This is Respondent Smith's Reply Brief to the Association's Answering Brief in this attorney disciplinary matter.

INITIAL MATTERS

Attempt To Use Plea Taken Under Oath As Collateral Estoppel on Issue of Conviction In Bar Proceeding: The Association puts great faith in its belief that the ELC 10.14(c) process is fair because Smith accepted the plea agreement under oath. They essentially seek to say that the admission in the federal proceeding can be deemed to be an have admission in the Bar proceeding. Unlike the proceeding below the Bar no longer makes the direct assertion that ELC 10.14(c) is permissible as a form of collateral estoppel, Association's Brief in Support of Hearing Officer's Decision, CP 98, but by its recurring reference to Smith having admitted matters under oath they seek to imply that it must be true simply because it was under oath in the federal forum. Smith specifically recanted the admissions in the plea agreement asserting they had been coerced. Nonetheless, by operation of ELC 10.14(c) he was denied the opportunity to explain his actions. As an out of court admission by a party, the admission in the federal case could be used to impeach Smith but it is not entitled any special weight as proof of his conviction absent an opportunity to explain his admissions and to recant them to put the issue before a trier of fact.

Alleged Attempt to Re-Litigate: There are times in the Answering Brief where the Association infers that Smith was afforded a trial and thus is not entitled to a "re-litigation" of his conviction. It is simply undisputed that Smith's conviction did not result from a trial. Rather, it resulted from his entering into a plea agreement which Smith asserts was coerced. In the name of judicial economy, he was denied the opportunity to show his side. It is factually disingenuous to claim Smith wants to "re-litigate" his conviction or is seeking a "...second opportunity ... to refute the criminal charges against him," Answering Brief, p. 20, when he never had a first time to explain what happened.

Allegedly Unanimous Decision By Board: At several places the Association claims the Disciplinary Board "unanimously" voted for disbarment. The Board's decision was not unanimous even though the Board uses that language in its orders. CP 106 and 120. It is important to make sure that the WSBA does not overstate its case. Eleven Disciplinary Board members attended the oral argument before the Disciplinary Board on July 24, 2009. Transcript of Oral Argument, page 2, Clerk's Documents # 105. Ten Disciplinary Board members are identified as having voted on the Disciplinary Board Order which was originally filed September 29, 2009. CP 106. Board members Fine and Carlson are identified as being in

attendance for the oral argument and the transcript does not reflect that they recused themselves.[1] According to the record, Board members Fine and Carlson were present during oral argument but no vote is recorded for them on the Board's order. The record also shows that Board member Anderson was not present at the oral argument but nonetheless voted on the Board Order. Given the fact that two Board members were at oral argument and yet did not vote on the order and the suspect nature of a third member's vote who was not even at the oral argument, the Board's vote cannot fairly be characterized as "unanimous."

Allegation That Smith Admitted He Committed Crime: The Association implies that because Smith admitted that he had pled guilty and admitted that he had admitted entering the plea agreement this is sufficient to find that he committed the crime. WSBA Answering Brief at 9. As set forth in the Opening Brief, Smith admitted that he pled guilty, but he did not admit the underlying allegation of misconduct, and in fact denied it. Admitting the conviction is not the same as admitting the crime despite the WSBA's attempt to imply that it is.

[1] Below signing counsel was, of course, present at the oral argument and frankly does not recall if there was an off the record recusal. The fact that Board members Fine and Carlson are listed as being present would seem to indicate there was not an off the record recusal.

Allegation that Smith Had Opportunity To Tell His Story: The Association asserts that Smith had the opportunity to tell his story as long as he did not challenge the essential facts of his conviction. WSBA Answering Brief at 12. That is the very point – in order to tell his story he had to challenge the essential facts of the conviction including explaining why he pled as he did and why he was innocent. The transcripts, see Opening Brief, are clear, the Hearing Officer was not going to allow Smith to explain what had happened and why. In at least one other jurisdiction with a rule similar to Washington, that is exactly the type of evidence allowed. *See* discussion regarding *Wilkerson* hereafter.

ISSUE BEFORE COURT

The question before this court is on the very narrow issue of whether the Association's rule ELC 10.14(c) creating an irrefutable presumption of criminal misconduct where a lawyer has pled guilty is constitutional? The Association's briefing, in a backdoor way, concedes that this is a case of first impression.[2]

[2] "The constitutionality of these provisions [ELC 10.14(c)] has not been seriously questioned." Answering Brief, p. 11.

In support of its position that ELC 10.14(c) is constitutional the Association cites *Rosenberg*,[3]a Maryland case in which the lawyer was convicted after a trial. The *Rosenberg* quote does not contain any "plea agreement" language. It specifically references a "criminal trial." *Rosenberg* was not a plea agreement case and none of the cases cited by the Maryland Supreme Court deal with a challenge to the constitutionality of a presumption of guilt based on a plea agreement.

The Association also cites *Wilkerson*,[4] a Louisiana case which did involve a plea agreement but the lawyer in that case did not challenge the rule of presumptive guilt based on a conviction, and thus the constitutionality of the rule was not before the Louisiana Supreme Court. In fact it is surprising that the Association cites *Wilkerson* at all as the facts are remarkably similar to Smith's and make the point as to why an absolute rule against challenging the conviction or against explaining why its essential facts are incorrect sweeps too broadly.

Wilkerson was convicted of being involved in a wire fraud scheme involving real estate. Unlike Smith, he was not precluded from presenting

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[3] *Maryland State Bar Ass'n v. Rosenberg*, 273 Md. 352, 329 A.2d 106 (1974).

[4] *Louisiana State Bar Ass'n v. Wilkinson*, 562 So. 2d 902 (La. 1990).

testimony about what happened, what the facts were and about his state of mind. In fact, the court eventually found that while Wilkerson was guilty of the crime, he believed at the time that his actions were lawful, and the court suspended him rather then disbarring him. *Wilkerson* is not a case on the issue of the conclusive presumption of guilt based on a guilty plea but is a case which permitted evidence Smith was prohibited from presenting.

There is also the relatively recent case in Washington of *Vanderveen*.[5] While not cited specifically on this point it is repeatedly referenced in the Answering Brief so the fact pattern is indirectly submitted to the court. *Vanderveen* was a plea bargain case but the issue of the constitutionality of ELC 10.14(c) was not ruled upon in that case and, therefore, it is not precedent for the argument that the presumptive conclusion of guilty after a plea bargain is constitutional.

In short, the WSBA presents no cases directly on point. Nor does the Association offer any valid policy reason for ELC 10.14(c). The Bar argues that the Washington rule has been around a long time, that many other states have a similar rule and the ABA provided for such a rule in its model rules. Just because a rule has been in use for a long time does not make it constitutional; the age of a rule where it has not been challenged

does not provide authority for its validity. Wide scale adoption of an unconstitutional rule or its inclusion in a model rule does not make it constitutional and is not authority for its constitutionality. Finally, the WSBA argues that rules like ELC 10.14(c) provides for judicial economy, avoids duplication of litigation and promotes finality of determinations. In short, it is a convenient way to get disbarments. Convenience does not trump justice.

The Association argues that Smith argues that a conviction on a guilty plea is less conclusive than a conviction after a jury trial. WSBA Answering Brief at 11. The Association misses the point. Smith concedes he was convicted, what he argues is that the issues in a plea bargain situation are different than in a case which has been fully litigated. Smith does not seek a review of all conviction cases, that is for someone else – the issue is not whether he was convicted but rather whether he can explain his plea bargain and, thereby, have the court determine whether the underlying conviction is valid.

The Association also asserts that Smith's argument regarding a conclusive presumption is not valid since due process under such a doctrine does not apply since Smith had been convicted. WSBA Answering Brief at

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[5] *In re Disciplinary Proceedings Against Vanderveen*, 166 Wn.2d 594, 211

12. This is a misreading. It maybe that one cannot use conclusive presumption challenges in the same case in which a conviction occurred but that is not the case here. In an ELC 10.14(c) case the WSBA seeks to apply a conclusive presumption in a different case based on what happened in the other case. This application of a conclusive presumption to prove an essential fact for the "conviction" in the Bar case is what is improper.

The Association also says that ELC 10.14(c) does not create a conclusive presumption since the conviction is an "adjudicated fact." WSBA Answering Brief at 12. It is true that the conviction is a fact but that is not the presumption. The presumption is that conviction proves that illegal conduct occurred. As discussed elsewhere in this brief, there are numerous instances where persons have been found guilty of crimes and every one of them will have a conviction but that does not mean they committed the crime.

ELC 10.14(c), in essence, creates the legal fiction that once an attorney has pled guilty to a crime, the prosecution must have been perfect and without any possibility of prosecutorial misconduct or mistake or other errors. As a result ELC 10.14(c) denies an attorney the opportunity to challenge his conviction and to collaterally attack it in the Bar proceedings.

P.3d 1008 (2009).

State and federal prosecutors make mistakes and overreach, sometimes intentionally.[6] That is why they are not entitled to absolute immunity.[7] *See, e.g., Hartman v. Moore*, 547 U.S. 250, n.8, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006) (absolute immunity does not extend to conduct taken by a prosecutor in an investigative capacity); *Van de Kamp v. Goldstein*, 556 U.S. ___, 129 S.Ct. 855, 172 L.Ed.2d 706 (2009), citing *Burns v. Reed*, 500 U.S. 478, 492-95, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991), (absolute prosecutorial immunity does not apply when a prosecutor gives advice to police during a criminal investigation, or when a prosecutor

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[6]The Opening Brief at p. 26 specifically cites the corrupt prosecution of convicted Wenatchee sex case defendants and of former Senator Ted Stevens. *See also, McGhee v. Pottawattamie County*, 547 F.3d 922 (8th Cir. 2008), *cert. granted* at 129 S.Ct. 2002 (2009) and then subsequently *dismissed* at 130 S.Ct. 1047 (2010). The prosecutors intentionally fabricated false evidence in the investigatory phase of the state's prosecution and later used that fabricated evidence to convict two innocent men who were then imprisoned for 25 years each. The district court and circuit court held "immunity does not extend to the actions of a [prosecutor] who violates a person's substantive due process rights by obtaining, manufacturing, *coercing* and fabricating evidence before filing formal charges, because this is not 'a distinctly prosecutorial function.'" *Id.* at p. 933. (Italics added.) Thus, the current rule in the Eighth Circuit is prosecutors do not have immunity when they obtain, manufacture, *coerce* or fabricate false evidence which they later use before a grand jury or at trial.

[7] ELC 10.14(c) in essence creates the legal fiction that once an attorney has been convicted of a crime, the prosecution thereof must have been perfect

acts as a complaining witness in support of a warrant application); *Buckley v. Fitzsimmons*, 509 U.S. 259, 274-76, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993) (no absolute immunity when prosecutor acts in administrative capacity or makes statements to the press). Stated differently, the U.S. Supreme Court in *Imbler v. Pachtman,* 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976)

> ...made clear that absolute immunity may not apply when a prosecutor is not acting as "an officer of the court", but is instead engaged in other tasks, say, investigative or administrative tasks. *Id.*, at 431, n.33, 96 S.Ct. 984, 47 L.Ed.2d 128.

Van de Kamp v. Goldstein, 172 L.Ed.2d, at 713.

The Association's ELC 10.14(c) contradicts the holdings of the U.S. Supreme Court because it effectively cloaks the prosecuting attorney's actions with absolute immunity from collateral attack and thus creating the legal fiction that all conviction are obtained without any defects and without any constitutional misconduct by prosecutors.

A state may not nullify a federal right or cause of action they believe is inconsistent with their local policies. *See, Haywood v. Drown*, 556 U.S. ____, 129 S.Ct. 2108, 173 L.Ed.2d 920 (2009). In *Haywood* the state of New York passed a law which divested state courts of jurisdiction

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and without any prosecutorial mistakes or errors because ELC 10.14(c)

over 42 U.S.C. §1983 actions brought by prisoners seeking monetary damages from correction officers. The policy reason for the law was to relieve congestion in the state courts by declaring such federal § 1983 claims as frivolous and vexatious. The U.S. Supreme Court rebuked New York's law:

> The State's policy, whatever its merits, is contrary to Congress' judgment that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages. As we have unanimously recognized, "[a] State may not ... relieve congestion in its courts by declaring a whole category of federal claims to be frivolous. Until it has been proven that the claim has no merit, that judgment is not up to the State to make."

Id., at 173 L.Ed.2d, p. 929. (Italics in original.) The Supreme Court held New York's law violated the Supremacy Clause of the U.S. Constitution:

> In other words, although States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies.

Id., at 928. Further, the Supreme Court stated:

> A jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear.

Id. at 930.

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denies an attorney the opportunity to challenge his conviction.

Here, Smith has a federal constitutional guarantee to substantive due process.[8] The U.S. Supreme Court has held that prosecutors do not enjoy immunity during the investigative phase of a case, and has further held that no immunity obtains when prosecutors later use obtained, manufactured, fabricated and coerced evidence in the prosecutorial phase of such case. *Haywood* makes it clear the Supremacy Clause of the United States Constitution[9] prohibits the State of Washington from using ELC 10.14(c) as a device to undermine Smith's constitutional guarantee of Due Process or to undermine Smith's right to challenge a conviction where a prosecutor engages in improper behavior such as coercing a plea bargain. Just as an offending prosecutor cannot "purify" ill-gotten investigative evidence by using it in the prosecutorial phase of a criminal case, neither

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[8] Substantive due process refers to certain actions that the government may not engage in, no matter how many procedural safeguards it employs. *Lambert v. California*, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957) (a law which gives no notice or opportunity to an accused—whose conduct is passive—to comply with the law and avoid its penalty, and is "but a law enforcement technique designed for the convenience of law enforcement agencies" (355 U.S., at 229), violates that person's right to due process).

[9] The Supremacy Clause, Art. VI, cl. 2, provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

can the Association "purify" such ill-gotten conviction by applying ELC 10.14(c) irrespective of whatever the Association's policy reason is for said rule.

All ELC 10.14(c) does is allow the Association's prosecutors a quick and streamlined vehicle for lawyer disbarment by having a convenient and inexpensive way to summarily disbar lawyers who have pled guilty of a crime while denying them the opportunity to explain why they are not guilty. It will not be a great burden to eliminate this presumption in the case of a guilty plea. The mechanics of the trial of such a case would be that the WSBA would present the conviction documents which would prove its prima facie case. The lawyer would then have to show why the conviction is not valid and why a plea bargain taken under oath is not an admission of guilt. In short, proof of innocence would be very hard for the Respondent but that is not a reason to deny him/her the opportunity to do so.

CONCLUSION

This appeal challenges the constitutionality of the key procedural rule used by the WSBA to find the ethical violations and to obtain the disbarment recommendation. That key rule is not constitutional and therefore cannot be used. Nothing submitted by the WSBA in its Answering Brief establishes the rule's constitutionality. Without the use of

that rule, the WSBA failed to prove its case against Smith and the case must be dismissed.

Dated this 20th day of May 2010.

/s/ Kurt M. Bulmer
Kurt M Bulmer, WSBA 5559
Attorney for Respondent Smith

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Kurt M. Bulmer
Attorney at Law
740 Belmont Pl. E. # 3
Seattle, WA 98102
(206) 325-9949 - Phone
(206) 325-9953 - Fax
kbulmer@comcast.net